No. 99-312

IN THE SUPREME COURT OF THE UNITED STATES

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner

v.

DEDRA SHANKLIN, Individually and as
Next Friend of Jessie Guy Shanklin,
Respondent.

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SUPREME COURT, U.S.

On Writ Of Certiorari To The
United States Court Of Appeals For The Sixth Circuit

MOTION OF THE STATE OF KANSAS AS *AMICUS CURIAE* FOR ADDITIONAL TIME FOR ORAL ARGUMENT AND TO PARTICIPATE IN ORAL ARGUMENT IN SUPPORT OF RESPONDENT SHANKLIN

Pursuant to this Court's Rule 28.3, 28.4, and 28.7, the State of Kansas, as *amicus curiae*, move that the Court grant an additional ten minutes for oral argument in this case so that Kansas, through its State Solicitor, Stephen R. McAllister, may argue on behalf of those States that support the Respondent Shanklin in this case. This motion has the consent of both Respondent Shanklin and the State of North Carolina, which filed the *amici* brief in support of Respondent Shanklin to which Kansas is a signatory. Kansas respectfully suggests that, in the unique circumstances of this case, argument by Kansas would provide assistance to the Court not otherwise available and would aid the Court in its resolution of the preemption issues presented.

I. Eleven States, including Kansas, joined the brief filed by North Carolina in this Court on January 28, 2000, supporting Respondent Shanklin in this federal preemption case. With all due respect, the interests of these twelve States are not currently represented adequately through the arguments the Court is scheduled to hear in this case.

A. In late January, shortly before the brief of North Carolina and the *amici* states was filed, this Court granted a motion by the State of Texas for divided argument as an *amicus* in support of Petitioner Norfolk Southern Railway Company. Texas previously filed an *amicus* brief on behalf of five states, supporting the Petitioner railroad. The time granted to Texas will come from the Petitioner's thirty minutes.

B. Also, in January, this Court granted a motion by the United States for divided argument as an *amicus* in support of Respondent Shanklin. The United States recently filed its *amicus* brief in support of Respondent Shanklin. The time granted to the United States will come from Respondent's thirty minutes.

II. This case is unique in that states have participated as *amici* on both sides of this case and that the United States also is participating as an *amicus*.

A. It is clear that the *amici* states represented by the State of Texas--embracing as they do federal preemption on the basis of mere federal spending--are not remotely representing the interests asserted by the *amici* states Kansas would represent at oral argument if the Court grants this motion. Nor does the United States, in preemption cases generally or this case in particular, represent the interests of the States. Although the United States may be willing to agree that Congress did not intend to preempt state law in the circumstances of this case, the United States is hardly interested in curtailing the overall nature and scope of Congress's power to

preempt state law. Thus, neither of the *amici* to whom the Court currently has granted argument time represent the interests of the twelve states that oppose federal preemption in this case and federal preemption of traditional state law in general.

B. If the Court grants this motion, Kansas would present an argument along the following lines: Although the statutory scheme at issue here makes clear that federal funding of safety improvements made at railroad crossings is a necessary condition for federal preemption, the Sixth and Seventh Circuits are correct that it is not a sufficient condition for such preemption. This Court should reject the doctrine of "constructive approval" in determining whether federal law preempts all state laws that otherwise apply to railroad crossings.

The statute itself, which is the only provision of law that Congress enacted, does not contain a clear statement of congressional intent to preempt state tort law on the basis of the mere expenditure of federal funds to install safety devices at railroad crossings. When the state's traditional police powers are at stake, a meaningful clear statement requirement is essential to respect the state's interests in protecting its citizens. Moreover, to the extent Congress desires to preempt state law, it must act under one of its affirmative Article I powers, such as the Commerce Clause. Congress and federal agencies lacks the authority to preempt state law in exercising the spending power, which operates in the nature of a contract with the states, thus creating "waiver" questions, not preemption issues.

Congress retains ample constitutional authority to regulate safety at railroad crossings. But it must do so in the constitutionally appropriate way, by using its commerce power directly. The mere expenditure of federal funds is not an acceptable proxy for exercising that power.

III. If this motion is granted, Stephen R. McAllister, the Kansas State Solicitor, will

present the oral argument on behalf of Kansas and the *amici* states that support Respondent Shanklin.

A. Solicitor McAllister served as a law clerk to Associate Justice Byron R. White and Associate Justice Clarence Thomas, and has previously argued before this Court in *O'Gilvie v. United States*, 519 U.S. 79 (1996), and *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999). He also is a tenured faculty member at the University of Kansas School of Law and will become that school's next dean on July 1, 2000. It is Kansas's hope that Solicitor McAllister's experience would provide assistance to the Court in its resolution of this case.

B. Kansas is aware that this Court's Rule 28.3 directs that "[a]ny request for additional time to argue shall be presented by motion under Rule 21 no more than 15 days after the petitioner's or appellant's brief on the merits is filed . . . ." Respectfully, Kansas urges the Court to accept this motion as timely filed under the unique circumstances of this case. With all due respect, Rule 28.3 appears to contemplate requests by the *parties* for time in excess of their usual "one-half hour for argument." Although technically the Rule may apply to Kansas's motion in this case, there are several considerations which suggest that Kansas could not reasonably have filed this motion within the time specified by Rule 28.3.

1. At the time of the deadline specified in Rule 28.3, Kansas had no way to know whether Texas would file, or this Court would grant, a motion seeking divided argument with the Petitioner. Nor, at that time, did Kansas or the parties know whether the United States would file an *amicus* brief in this case with the likely result that the United States would ask for and receive time for oral argument.

2. Second, it is more reasonable in general, and presumably more useful to the Court,

for *amici* to wait until they actually file an *amicus* brief before making a motion for divided argument or additional time for oral argument. With all due respect, Kansas suggests that ruling on such motions might be more difficult for the Court without the benefit of the actual *amicus* brief. Furthermore, if read to apply to *amici* in the circumstances presented in this case, Rule 28.3 would encourage *amici* to file such motions much earlier in the case than is reasonably necessary and, unlike Rule 28.4 governing requests for divided arguments, unfairly advantage those *amici* that support petitioners while simultaneously disadvantaging those *amici* that support respondents.

Conclusion

For the foregoing reasons, the State of Kansas respectfully requests that this Court grant Kansas ten minutes of oral argument in this case, to be added to the one hour already allotted for oral argument.

Respectfully submitted,

STEPHEN R. McALLISTER
Kansas State Solicitor

January 31, 2000

NORFOLK SOUTHERN RAILWAY COMPANY v. DEDRA SHANKLIN.
NO. 99-312

CERTIFICATE OF SERVICE

I, Stephen R. McAllister, a member of the bar of this Court, hereby certify that all parties required to be served have been served pursuant to this Court's Rule 29.3 by mailing a copy of Kansas's Motion for Additional Time for Oral Argument and to Participate in Oral Argument in Norfolk Southern Railway Company v. Shanklin, No. 99-312, by first class United States mail, postage prepaid, this 31st day of January, 2000, addressed to the following:

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